86-972

Supreme Court, U.S.
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No. . . . .

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SALLY HUMMEL,
Petitioner,

vs.

PETER HUMMEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an action for dissolution of marriage, the refusal to recognize Wife's separate property interests violated Wife's rights under the Fourteenth Amendment of the Constitution.[1]

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[1]List of parties:

Sally Hummel, Petitioner

and

Peter Hummel, Respondent

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CITATION TO OPINIONS BELOW

Decision and Findings of Fact and Conclusions of Law and Judgment and Decree in the Second Judicial District Court of the State of Nevada In and For the County of Washoe. Case No. 16150. See Appendix "A" hereto.

Order Dismissing Appeal in the Supreme Court of Nevada. Case No. 16150, April 9, 1956. See Appendix "B" hereto.

Order Denying Rehearing in the Supreme Court of Nevada, Case No. 16150. See Appendix "C" hereto.

JURISDICTIONAL STATEMENT

The statutory provision believed to confer jurisdiction on this court to renew by writ of certiorari the judgment in question is 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS

The constitution provisions involved in this case are as follows:

(a) The "Equal Protection and Due Process Clause" of Section 1 of the Fourteen Amendment to the Federal Constitution.

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Wife brought this action for divorce on February 10, 1981, alleging that all property acquired during the marriage was her separate property, except property acquired by Respondent Husband with earnings from the course of his employment. Trial commenced August 1, 1982. At trial, Wife asserted that all assets of the oil business managed by Husband, with the exception of certain general partnership interests, were her separate property, on the grounds that although she knew Husband was involved in the oil business, nevertheless she did not consent to his vast expenditures of her own money, that Husband has assumed control of the parties' finances and deprived Wife of any management opportunities, that as it turned out she had in fact financed the oil business with her own separate funds, that her separate

funds were traceable to substantially all assets of the oil business, and that Husband had agreed to reimburse her for her separate funds expended on behalf of the community. When the Hummels moved to Reno in the early[1] 1960's, Husband began an oil business (R.T. 137, 335). The oil business consisted of evaluating oil and gas prospects, filing for oil and gas lease parcels, and petroleum consulting (R.T. 329). The oil business generated losses every year (R.T. 251). Between 1970-1980, the oil business generated losses of approximately $685,000 (in terms of taxes, there was an effective tax savings of 48.33%, so that of the $685,000 loss, $331,000 was subsidized by the government (R.T. 570). Since the oil business was an income losing venture at all times during the marriage, it was of necessity financed with funds from Wife's trust fund income or with loans issued on her sole and separate credit (R.T. 54, 55, 87, 147, 401, 571). Moreover, her trust fund income was used to pay off these loans (R.T. 69, 70, 88, 400).

Wife never received any support from Husband, nor did she receive any money from the oil business (R.T. 251, 253, 274). Husband was in complete charge of the oil business, and Wife had nothing to do with its management (R.T. 248). In 1977, Husband locked wife out of the business office and prevented Wife from seeing the financial records of the business (R.T. 249, 251).

Wife has a separate trust fund income in the neighborhood of $200,000 per year (Findings of Fact, No. 11). She was the daughter of an important financier, E.L. Cord (R.T. 246, 658, 659). E.L. Cord established two trust funds for the benefit of his daughter, one in 1935 and one

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[1]Hereinafter RT refers to the Reporter's Transcript prepared on appeal.

in 1969 (R.T. 95, 111-112). Trust Fund No. 1006 was established by E.L. Cord for Wife's benefit in 1969 (R.T. 111, 112). Between 1956 and 1979, the income from these two trusts constituted the sole and separate property of Wife, and generated income of approximately $2,838,000, as compared to a total income allegedly generated by Husband of $138,000 during all of said years (R.T. 87, 89; plaintiff's Ex. B-1).

Wife's trust fund income was used to pay for the entire living expenses of the family, including payment of the mortgage on the house (R.T. 127). From 1970 through 1980, $1,539,360 of Wife's trust income was distributed for the benefit of the family, *i.e.,* living expenses, and to finance the oil business. Out of this $1,539,316, approximately $535,000 was contributed by Wife to finance the oil business, and approximately $1,000,000 was contributed for family living expenses (R.T. 71, 84, 85, 87, 273, plaintiff's Ex. B-1). Conversely, Wife never received any money from the oil business (R.T. 274).

Over and above the significant contributions from Wife's trust fund income for the oil business, a major part of the capital financing for the oil business came from bank loans (R.T. 54, 55, 87, 571). Her trust fund income was used to pay off these loans (R.T. 69, 70, 88, 400). In addition, to obtain these loans for the oil business, Wife signed continuing guaranties (R.T. 345). Wife's interest in oil and gas limited partnerships was also used by Husband to finance the oil business (R.T. 382). In sum, it was impossible for Husband to conduct the oil business without the use of Wife's trust fund income and her credit (R.T. 147, 401).

The Husband had set up the Building Account, as well as all of the other bank accounts of the community and the business (R.T. 334). He had sole and complete con-

trol of the checkbooks of *all* accounts, balanced all of the checkbooks, and wrote and paid all of the expenses of the family, as well as the oil business (R.T. 129, 247, 248, 337, 383). He kept all of the records of the bank accounts (R.T. 246. Husband also paid all of the office expenses (R.T. 143). He also commingled Wife's separate property with the community's joint bank accounts (R.T. 347).

Wife did not write checks or make bank deposits (R.T. 383). In fact, she was totally unskilled in the ways of banking (R.T. 383).

Wife never intended to make a gift to Husband of her separate property funds (R.T. 118, 119).

In 1961, Husband agreed to reimburse Wife for contributions of her separate property expended to defray community living expenses. This oral agreement is evidenced by a document signed by Husband. Testimony at trial was completed August 27, 1982.

The District Court made no written decision until November 10, 1983 and in its Findings of Fact and Conclusions of Law and Judgment Decree, dated December 30, 1983, held that substantially all of the assets of the oil business were community property of the parties. *At page 11 and following of the Decision the trial court openly acknowledges the arbitrary nature of its holdings. See Appendix "A."* Appeal followed to the Nevada Supreme Court which appeal resulted in a denial of relief to Wife. See Appendix "B". Request for rehearing by Wife was denied on September 11, 1986, which denial this Petition for Writ of Certiorari follows. See Appendix "C".

ARGUMENT

A. WIFE HAS DENIED RECOGNITION OF HER SEPARATE PROPERTY INTERESTS IN VIOLATION OF HER CONSTITUTIONALLY GUARANTEED RIGHT TO ACQUIRE, ENJOY, OWN AND DISPOSE OF PROPERTY.

1. Commingling of and failure to segregate community and separate property by the Husband in his capacity as the managing and controlling spouse could not serve as a ground for obviating his fiduciary duties as a trustee to the Wife. His failure to segregate of necessity created the presumption that property acquired after the marriage was Wife's separate property.

The courts below have refused to apply the cases of *Ormachea v. Ormachea,* 67 Nev. 273, 217 P.2d 355 (1950) and *Fox v. Fox,* 81 Nev. 186, 401 P.2d 53 (1965) against the Husband because of purported acquiescence by the Wife. As will be shown below, that analysis represents a fundamental misreading of and misapplication of *Ormachea.* The presumption that property acquired after marriage is community, arises only when the property has been acquired with funds from a commingled source *and* the spouse asserting the separate property character of that property was the commingling party. The determination is to be made against the commingling party.

In *Ormachea v. Ormachea,* 67 Nev. 273, 217 P.2d 355, the husband and wife were parties to a common law marriage. The husband owned ranches and a livestock-raising business as his own separate property, which increased in value as a result of his skill and industry. However, no attempt was made by him to keep the separate property and community property segregated, so

that at the time of trial, it was impossible to determine what was separate and what was community. The court held that where no attempt was made to keep separate and community property segregated and at the time of trial it becomes impossible to determine what is community and what is separate, the intermingled properties were considered community properties. Notwithstanding the decision that the commingled properties were community, the holding turned on the fact that the husband, as the manager of the community, failed to segregage; thus the determination as to what was community and what was separate was made against him because he was the party at fault.

In *Ormachea* the commingling party's failure to segregate his separate property interest from those of the community resulted in a loss of his separate property interest. *Ormachea* is not authority for the proposition that a commingling party may convert his spouse's separate property to community property through his own independent conduct of community business affairs.

In *Fox v. Fox,* 81 Nev. 186, 401 P.2d 53, the husband was the manager of the community assets. There was one substantial contribution to the assets of the community which could not be traced. The court held that the value of the community property was deemed increased by the additional income from the unidentifiable source because the husband failed *in his duty as the manager* to keep separate property and community property segregated. The *Fox* court held that the husband's position, as the manager of the community property was fiduciary in nature and that he was a trustee of the wife's share analogous to the trustee relationship of a partner to his partnership or an agent to his principal (Fox, supra, 401 P.2d 53, at 57). Thus, there is a fiduciary duty owed to

the non-managing spouse, and the managing spouse is accountable as a fiduciary (N.R.S. 87-210).

In *See v. See,* 415 P.2d 776, 64 Cal.2d 778, 51 Cal.Rptr. 888 (1966), the husband was the managing spouse and had commingled community property income with his separate property income in a single bank account. He paid community expenses out of that bank account and attempted to prove at trial that since community expenses exceeded the community income during the marriage, no property acquired during the marriage had been so acquired with community funds. The *See* court held that property acquired during marriage by purchase is presumed to be community property. However, the *See* court went on to state that this presumption only applied against the commingling spouse who had purchased the property during the marriage with funds from an undisclosed or disputed source. (See *See,* 415 P.2d 776, at 779.)

Thus, it is apparent under *Ormachea, Fox, and See,* that the presumption that property acquired after marriage is community only arises when the property has been acquired with funds from a commingled source and the spouse asserting the separate property character of that property was the commingling party. As the fiduciary, if the managing party fails to properly account and segregate, the presumption will be applied against him.

Further, there is nothing in *Ormachea, Fox,* or *See* to indicate that the non-managing spouse's acquiescence in the commingling activities of the managing spouse and acquiescence in the failure of the commingling spouse to properly segregate, serves as a ground for not applying presumption against the commingling spouse, especially in the light of his duty as a fiduciary and trustee to the non-managing spouse.

Where, as here, the husband is the manager and commingler, the presumption should be that commingled property is the separate property of the non-managing spouse. This is especially true where, as here, the Wife, as a result of her upbringing, was unsophisticated, unversed, and inexperienced by reason of her upbringing and background in financial and business affairs, and where, as here, she had placed full trust in her husband for almost the full term of the marriage. By contrast, the Husband had substantial business sophistication, knowledge of the world, and knowledge of finance and business affairs. He kept all bank accounts, made all bank deposits, balanced all bank statements, and who commingled Wife's vast separate property income with whatever meager community property income existed during the course of the marriage. In this capacity, Husband had a fiduciary duty to segregate and account for the vast separate property funds of Wife that he commingled. Husband did not segregate and account. Accordingly, the presumption should be applied against him; *i.e.*, that all of the assets of the oil business must be presumed Wife's separate property.

Applying *Ormachea, Fox,* and *See* to this case, Husband, as manager of the household and business, had the duty to segregate, and in failing to segregate, the ordinary presumption that after acquired property is community must be applied against him. It must be presumed that all property acquired was the separate property of the Wife. Husband presented no evidence to rebut this presumption. In fact, the great weight of the testimony is against him. Moreover, no authority proposes that a wife's acquiescence in her husband assuming management of the community dispenses with his duty to segregate and account.

2. There could not have been a gift by Wife of her separate funds to the community when she did not manage the assets of the parties and when there were no alternative community assets.

The District Court's written decision holds that Wife made a gift of her separate property to the community (p. 6, ll. 29-30, p. 7, ll. 1-8), and that assets of the oil business were community property (p. 10, ll. 11-13). In so holding, the court relied on *Cord v. Cord*, 98 Nev. A.O. 65, 644 P.2d 1026 (1982) and *See v. See*, 415 P.2d 776, 64 Cal.2d 778, 51 Cal. Rptr. 888 (1966). Wife submits that *Cord* and *See* do not warrant the conclusion of the District Court, first, because Wife did not and could not have made a *conscious election* to use her separate property for community expenditures (which conscious election presupposes the existence of community property to pay community expenditures) and, secondly, because Wife was not the manager of the property of the parties, so that she could not have made a conscious election to pay community expenditures with community income (which in fact did not even exist).

In *See*, the court concluded the husband had made a gift of his separate property based on the existence of both separate property and community property and that the husband had elected to use separate property instead of existing and available community property. In *See*, the husband, while managing the community was receiving a substantial salary which he rarely used to defray community expenses. Here, there was neither available community income to pay community expenses, nor was Wife the manager of the property of the parties.

In *Beam v. Bank of America*, 490 P.2d 257, 6 Cal.3d 12, 98 Cal. Rptr. 137 (1971), the husband had substantial separate property which was used to pay family expenses.

The wife contended that under *See* there had been a gift of separate property for which the husband could not be reimbursed. The California Supreme Court distinguished *See, holding that there had been no conscious election by the husband to make a gift.*

> In the second place, in *See,* unlike the instant case, we addressed inter alia a situation in which a husband *chose* to pay community living expenses from existing separate funds rather than from existing community property; the husband later claimed that he was entitled to *reimbursement* for such expenditures from after-acquired community assets. Under those circumstances, we held that "a husband who *elects* to use his separate property cannot claim reimbursement. . . ."
>
> In the instant case, of course, Mr. Beam made no conscious choice to spend his separate property, rather than the "imputed" community property on the family's living expenses. Only by means of a formula now applied by the court do we divide Mr. Beam's income into theoretical "community" and "separate" portions; Beam could hardly draw upon a fictionalized separate source to pay family expenses. Thus our decision in *See* is simply not in point.
>
> If Mr. Beam's actions demonstrated that he had made a conscious choice to use separate property, as opposed to available community property, to pay living expenses, such use of his separate property would of course constitute a gift to the community for which he would be entitled to no reimbursement. (*See v. See* (1966) 64 Cal.2d 778, 785, 51 Cal. Rptr. 888, 415 P.2d 776.) The record clearly shows, however, that Mr. Beam's testimony rested totally on his assumption that *all* of his funds were his separate

property; we cannot realistically characterize the husband's testimony as indicating that he consciously chose to pay for community expenses out of income which we now deem purely separate income, rather than from the income which, theoretically under the *Van Camp* formula, may now be designated community income. *Beam v. Bank of America*, 490 P.2d 257, 264, 265.

In *Cord v. Cord*, 98 Nev. A.O. 65, 644 P.2d 1026 (1982), the widow appealed from a judgment which declared all assets from the estate of the decedent to be separate property, the court holding decedent never made a *conscious choice* to use his separate property, rather than *available* community property, to pay community expenses, since decedent's expenditures for community expenses were made while operating under erroneous assumption that the parties' post-nuptial agreement was valid and that all his funds were his separate property.

The facts in the instant case are more akin to those found in *Beam v. Bank of America*, 6 Cal.3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (1971). In *Beam v. Bank of America, supra*, the plaintiff husband assumed during the course of marriage that all his funds were his separate property. The evidence reflected that Mr. Beam did not make a conscious choice to spend his separate property on community expenses. The court in *Beam* distinguished *See v. See, supra*, and noted:

> In the instant case, of course, Mr. Beam made no conscious choice to spend his separate property, rather than the "imputed" community property on the family's living expenses. Only by means of a formula now applied by the court do we divide Mr. Beam's income into theoretical "community" and

"separate" portions; Beam could hardly draw upon a fictionalized separate source to pay family expenses. Thus our decision in *See* is simply not in point.

Beam v. Bank of America, 6 Cal.3d 12, 98 Cal. Rptr. 137, 144, 490 P.2d 257, 264 (1971).

Here, E.L. Cord's expenditures for community expenses were made while operating under the assumption that the parties' post-nuptial agreement was valid, and all his funds were his separate property. Consequently, E.L. Cord never made a conscious choice to spend his separate property on community expenses which exceeded community assets.

If E.L. Cord had made a conscious choice to use his separate property, rather than available community property, to pay community expenses, such use of his separate property would have constituted a gift to the community for which reimbursement could not be claimed. See *See v. See*, 64 Cal.2d 778, 51 Cal.Rptr. 888, 415 P.2d 776 (1966). The record clearly establishes, however, that E.L. Cord assumed through the years 1953 until his death in 1974 that all of his funds were his separate property. He did not consciously elect to pay for community expenses out of income which is now deemed separate in character.

The standard enunciated in *Beam v. Bank of America*, 6 Cal.3d 12, 98 Cal.Rptr. 137, 490 P.2d 257 (1971) supports the district court's ruling requiring reimbursement to E.L. Cord's separate estate for expenditures on family living expenses in years when

community assets were exhausted. *Cord v. Cord*, 644 P.2d 1026, 1029.

Wife, like her father in *Cord*, assumed that the income from her separate property trust funds constituted her separate property; it is clear from Wife's testimony that she considered all of the income from her trust accounts to be her separate property (R.T. 121, 122, 127, 133, 143, 149, 248). Secondly, she never made a conscious choice to use this separate property to pay community expenses because there was no available community income from which the community expenses could have been paid. Third, she was not the manager of the community, and as such did not have the power to choose between separate income and community income (which was nonexistent in any event) to pay the community expenses.

The present fact pattern is distinguishable from the situation in *See*, where the husband was receiving a substantial salary constituting community property which he did not often use to pay family expenses, rather using his sole separate property to pay the community expenses. In the case at bar, there was no community property income to expend or income received by Wife from the community. As Wife testified, she never received money from the oil business, which suffered losses every year. The evidence indicated all of the community expenditures were paid out of her separate estate. The evidence indicated that approximately 98% of all income during the course of the marriage between the parties was derived from Wife's separate property trust income. At the very least, the testimony indicated that Wife's separate trust generated income of approximately $2,800,000, as opposed to alleged community earnings of approximately $160,000.

The evidence is quite clear that Husband contributed little or nothing in the way of income during the course of the marriage. In order for Wife to live in the style to which she was accustomed and for the family to have those things necessary to their normal standard of living, it was necessary that the separate property trust income of Wife be used to defray normal everyday living expenses, because there was no community income available. Therefore, there could have been no conscious election on the part of Wife to use her separate property funds instead of available community funds (which did not exist in fact) to defray family living expenses.

With reference to *Beam* and *Cord*, Wife could hardly draw upon a "fictionalized" separate source to pay family expenses. Pursuant to the dictates of *Beam* and *Cord*, Wife is entitled to reimbursement for those separate property funds used to defray community expenses, as well as those separate property funds used to finance the oil business.

3. **Wife was wrongfully denied tracing of her separate property.**

Property acquired after marriage is presumed to be community property, but this presumption may be rebutted by clear and convincing evidence, *Carlson v. McCall*, 70 Nev. 437, 271 P.2d 1002, *Peters v. Peters*, 92 Nev. 687, 557 P.2d 713 (1976), *Lucini v. Lucini*, 97 Nev. 213, 626 P.2d 269 (1981).

In *Lucini, supra*, substantial evidence supported the trial court's finding that community and separate income and expenditures were traceable where the character of the property was established through the tracing of funds contained in two marital bank accounts through the testimony of the accountants for both parties. Even where

some funds are unaccounted for, substantial evidence can be presented to support the trial court's finding that community and separate income and expenditures were traceable. *Kelly v. Kelly*, 86 Nev. 301, 307, 468 P.2d 359, 363 (1970). (*Lucini v. Lucini*, 97 Nev. 213, 626 P.2d 269 (1981), at 271).

In *Kelly v. Kelly*, 86 Nev. 301, 307, 468 P.2d 359, 363 (1970), the trial court found the parties owned no community property. The wife appealed, contending the community should be reimbursed for services rendered by the husband to his various separate properties and that certain properties acquired in Nevada be determined to be community property. The court held that while the community property presumption that all property acquired during marriage was rebuttable, the trial court had acted properly in failing to do so because the community made no measurable enhancement to the husband's vast separate property trust and affirmed.

In re Marriage of Mix, 14 Cal.3d 604, 536 P.2d 479 (1975), the parties were married in 1958. Between 1958 and 1963, community property and separate property funds were commingled in a joint bank account. From 1963 through 1968, community property and separate property were commingled in an account maintained by the wife alone. The *Mix* court found the totality of the evidence adequate to trace to a separate property source.

In *Estate of Goodhew*, 174 Cal.App.2d 75, 344 P.2d 63 (1959), the court held that money from separate property rents was not converted into community property upon being deposited into the same bank account with community funds because the amount of the separate funds deposited were ascertainable and, *ergo*, traceable. (Also see, *Hicks v. Hicks*, 211 Cal.App.2d 144, 27 Cal.Rptr. 307 (1962).

The expenditures of community property exceeded community property income. Thus, Wife's separate property was traceable to all or substantially all of the assets of the oil business.

If it can be shown that at the time of the acquisition of the property in dispute, all community income in the commingled account or accounts was exhausted by family expenses, then all funds existing at the time the property was purchased were necessarily separate funds, and the property purchased with those funds is separate property. *Estate of Murphy* (1976) 15 Cal.3d 907, 918, 544 P.2d 956; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 612, 536 P.2d 479; *See v. See* (1966) 64 Cal.2d 778, 783, 415 P.2d 776; *Beam v. Bank of America*, 6 Cal.3d 12, 490 P.2d 257 (1971).

4. **Recapitulation of total community expenses and income tracing is appropriate herein.**

Another method of tracing, and the most appropriate for the case at hand, is the recapitulation of the total community expenses and income throughout the marriage to establish the character of the property. This is used when it is not possible to ascertain the balance of income and expenditures at the time the property was acquired and when the commingling has occurred through no fault of the spouse claiming the separate nature of the property. *See v. See* (1966) 64 Cal.2d 778, 783, 415 P.2d 776; *In re Arstein's Estate*, 56 Cal.2d 239, 364 P.2d 33 (1961); *In re Ade's Estate*, 81 Cal.App.2d 334, 184 P.2d 1, 4 (1947). The rationale for this rule is that the managing spouse owes a fiduciary duty to segregate community property and separate property. Thus, when a spouse commingles, the law presumes against the commingling spouse (see *Ormachea, Fox, Cord* and *Beam, supra*). Wife

submits the courts below sorely erred by not applying the "recapitulation" method of tracing. The use of this method unequivocally establishes the nature of the oil business as Wife's separate property.

The evidence established that almost all income received by the community during the marriage was derived from Wife's separate property trust funds, that the oil business suffered losses every year, that at least approximately 98% of all income during the course of the marriage between the parties was derived from Wife's separate property trust income and that community expenses grossly exceeded Community income.

Based upon a recapitulation of the aggregate income during the marriage, the separate income of Wife, and the inconsequential income of the community (rather, the substantial losses of the oil business, even taking into account the so-called "tax savings"), it is apparent that substantially all of the property acquired during the course of the marriage belongs to Wife as her sole and separate property (*See v. See, supra; In re Arstein's Estate, supra; In re Ade's Estate, supra*). In *In re Arstein's Estate*, the California Supreme Court held that where community income during marriage was substantially less than community living expenses, none of the estate left by the husband, who had a substantial estate at the time of marriage, consisted of community property.

> The trial court made the following findings: (1) decedent's net worth at the time of marriage was at least \$438,918.93; (2) aggregate income during the marriage was \$256,277.23; (3) separate income of decedent was at least \$184,345.98; (4) community income during the marriage was a maximum of \$71,931.25; (5) community living expenses duirng the marriage were at least \$108,868.40.

> Predicated upon the foregoing findings, the trial court found that the entire estate of decedent consisted of his separate property, since living expenses during the marriage exceeded community income. (*Id.,* at p. 241.)

The California Supreme Court affirmed.

In the case at bar, separate income of Wife in the amount of approximately $2,800,000 far exceeded community income. Since living expenses during the marriage also far exceeded community income (which was in fact almost nonexistent), it must be held, as *In re Arstein's Estate,* that all assets of the oil business are Wife's separate property.

5. Wife was entitled to reimbursement pursuant to an agreement between the parties that Wife was to be reimbursed for contributions of her separate estate used to defray community expenses.

In addition to the foregoing, Wife proved at trial an agreement in 1961 between the spouses that Wife was to be reimbursed for contributions of her separate estate used to defray community expenses. This agreement was evidenced by a written document signed by Husband (Ex. Y). It is further evidenced by the testimony in Virginia Kirk Cord's deposition and by the testimony of Wife (R.T. 118, 199). The evidence of this agreement for reimbursement was not refuted by Husband. A party is entitled to reimbursement for contributions of separate property for community expenses if agreed to between the parties. *Beam v. Bank of America,* 490 P.2d 257, at 264.

6. **Even in division of assets, the courts below egregiously violated Wife's rights to equal protection and due process of law.**

The courts below held that Intermountain Petroleum limited partnership was community property, then awarded more than one-half of it to Husband, but did not award assets of equal value to Wife to equalize the disparity. (District Court's written decision, P. 11, ll. 5-17.) Evidently, the court's rationale was that "repayment of the loan diminishes the value of the partnership interest to Husband." However, the loan by First National Bank of Dallas was made by the Bank without Wife's consent (R.T. 403) and with knowledge on the part of the Bank that Wife was not going to guarantee the loan (R.T. 409). Without Wife's acquiescence, the loan was made by First National Bank of Dallas, diminishing the value of the partnership interest, not only to Husband, but as to Wife as well. There is no reason why Wife must suffer for conduct on the part of the Husband to which she did not acquiesce.

As to the Paine Webber stocks and the Tide Petroleum stock, the award of these assets to Husband as his separate property was a particularly egregious error in that Husband admitted paying margin calls with Wife's money, thus commingling community and separate property (R.T. 459-461). With respect to Tide Petroleum stock, Husband testified, and the documentary evidence shows, that the money used to purchase it came from stock in the aforementioned Paine Webber account. Application of the law was plainly unequal, arbitrary, irrational and unfair under the constitutional precepts discussed hereinabove in that Wife is being made to suffer the consequences of Husband's commingling while

Husband is not, despite the fact that *commingling was unilaterally effected by the actions of Husband.*

The courts below awarded all of certain leases pledged for a loan from the First National Bank of Dallas to Husband, but ordered that half of the debt on that loan would be Wife's obligation, without awarding Wife assets that would compensate for the patent unfairness in this "division," based on purported liabilities outstanding to a Frank G. Wells for funds advanced for drilling costs but no substantial evidence was produced to prove these liabilities. The value of the leases was, moreover, substantially greater than the size of the loan. The windfall to Husband is clear.

The liabilities unproven were uncertain. A contract is unenforceable if it is uncertain. Due to a lack of specific terms, any negotiable instrument and/or promissory note requires payment of a sum certain. N.R.S. 104.3104. Loans may be void for indefiniteness. (Annotation at 89 A.L.R. 1364.) If, in fact, there is no specific interest rate or repayment date, the obligation is unenforceable. *Dolanson v. Citizens and Southern National Bank*, 251, S.E.2d 274 (1978); *Hunt v. McIlroy Bank*, 616 S.W.2d 759 (1981). Assuming, *arguendo*, that no enforceable obligation existed, the decision of the District Court to award Husband the Hummel Wells Joint Venture was totally erroneous.

Further, the lower courts failed to distribute at least fifty-two separate oil leases. Husband, through objection at trial, limited the number of oil leases to be considered by the courts to leases in which the parties had either an individual interest or an interest held as part of a partnership. (R.T. 306-310; 417-424; 681-684.)

Over the years, Husband had assisted many wealthy clients in obtaining oil leases. Once the leases were secured, limited partnerships were formed for the purpose of developing tracts purchased. Husband, due to his expertise, served as general partner in those partnerships. Husband stopped creating oil lease partnerships in anticipation of divorce, but continued to work for clients by assisting them in the purchase of oil leases, charging those clients only for out-of-pocket expenses. Once purchased, the leases belonged to the clients. Husband denied the existence of any formal agreements to form partnerships in the future, but conceded that his "clients" remained free to do whatever they wished later, from the standpoint of developing those leases.

The trial court refused to allow Wife access to a list of the clients or their leases. It is submitted that the community had an interest in all of the activities undertaken by Husband prior to dissolution of the marriage. The admitted work, client contact, and assistance Husband gave his "clients" while the marriage was intact generated a divisible property interest.

Husband hired the accounting firm of Pannell, Kerr & Forster but the debt was assessed to Wife alone. There is no evidence that Pannell, Kerr & Forster did any work for Wife on an income tax return relating to her non-oil business income, as the parties filed separate returns. Since the courts below held that the oil busines is community property, the court cannot assess Husband's accounting fees as a debt to Wife alone.

The lower courts found that the Husband made imprudent gifts to his secretary and office manager, Mary Ann Sanchez, during the years 1978 through 1981 (Court Decision, p. 6, ll. 11-15). These gifts came out of accounts which were separate property of Wife. Even if the

gifts came from community property, the law is well settled that both spouses must consent to gifts of community property. (See N.R.S. 123.230.) In addition, the court found that the gifts of community property to Mary Ann Sanchez by Husand were not made with the implied consent of Wife, citing N.R.S. 123.230 (court Decision, p. 15, 11. 13-18). A credit to either Wife's separate or the parties' community interests should have been made by the lower courts but was not.

Moreover, the lower courts unjustly and without basis ordered Husband to pay child support of only $100.00 a month for the support and maintenance for their remaining minor child, despite a proven annual income for 1972 of at least $72,000.00.

The manifestly arbitrary, unreasonable and unjust actions of the courts below are exemplified by the foregoing irrational and prejudiced orders and awards. Writ of certiorari is therefore respectfully sought.

B. THE TRIAL COURT'S APPLICATION OF THE LAW HERE WAS TANTAMOUNT TO DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS, INCLUDING HER RIGHT TO DUE PROCESS AND TO EQUAL PROTECTION OF THE LAW.

Among the civil rights protected by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. State action of every kind, inclusive that by state courts and judicial officers, even if taken pursuant to the state's common-law policy, is subject to the protections guaranteed by Constitution. *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161.

The trial court in this action improperly condoned, through its decision, what was, in effect, conversion of

Wife's property by Husband and attendant and flagrant breach of his fiduciary duty to her. Failure to properly apply the law as set forth in *Ormachea, Fox, See, Beam* and *Cord* and other cases cited herein, deprived Wife of her rights under the Constitution to equal protection of the law, substantive and procedural due process, and the rights to own and enjoy of property. *Shelley v. Kraemer, supra.* Classifications based on sex, like classifications based on race, lineage and national origin are inherently suspected and therefore must be subjected to close judicial scrutiny. *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583, 589. There is no explanation for the severely uneven application of the law in this case other than unreasonable, arbitrary and capricious application of the law herein, based on the gender of the parties, motivated by undue favoritism afforded a male spouse who, although he misused and violated the mandates of law and equity, was functioning in the traditional role of his sex as the managerial and controlling spouse.

Where no rational basis exists for classification made through state action, a citizen's right to equal protection of the law has been violated. If, however, the discrimination affects interests of fundamental importance, such as the right to ownership and enjoyment of property, the state must establish that the action taken, legislative and/or judicial, is necessary to vindicate a compelling governmental interest and that it does not impose more burdens than are reasonably needed to accomplish the purpose. *People v. Santiago* (1975) 379 N.Y.S.2d 843, 853, 51 A.D. 2d 1.

> " '. . .[I]t may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circum-

> stances . . . and that it applies to the exercise of all the powers of the state which can affect the individual or his property . . . The classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation [or other state action], so that all persons similarly circumstances shall be treated alike." [Citations.] That is to say, *mere* difference is not enough [to justify the classification]: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never been made arbitrarily and without any such basis." [Citation.] Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' " *Hartford Co. v. Harrison* (1936) 301 U.S. 456, 461-462.

Herein, classification is clearly unfair, arbitration, and unreasonable.

Where state action is unreasonable, arbitrary or capricious and the means selected to vindicate a specific purpose has no real or substantial relation to the object sought to be obtained, the right to due process of law has been violated and police power wrongly exercised. *Nebbia v. People of State of New York* (1933) 291 U.S. 502, 54 S.Ct. 505.

> " 'Due process' emphasizes fairness between the state and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations

> are arguably indistinguishable." *Ross v. Moffitt* (1973) 417 U.S. 600, 609.

Arbitrary deprivation of Wife's right to own, acquire, enjoy and dispose of property by said action totally lacked relationship to any condition, ". . . imposed by the State for the protection of society." *Dent v. West Virginia* (1988) 192 U.S. 114, 122.

In the *Dent* case, licensing of medical practitioners was upheld as in furtherance of the protection of society and its general welfare. This licensing requirement serves a valid and genuine societal need for medical services by doctors guaranteed to be qualified. Unfairly penalizing Wife herein for submitting to traditional family roles and favoring Husband by excusing, and in fact rewarding his violation of his position of management and control cannot reasonably be said to have any just or reasonable purpose.

> "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." *Shelley v. Kraemer, supra*, 334 U.S. 1, 17, 68 S.Ct. 836, 844.

In order to be a valid exercise of the state's power, the means selected must be neither arbitrary, capricious or in bad faith, and they must, in fact, further a legitimate objective. The state action described herein is and does none of the above, and as such is subject to reversal.

CONCLUSION

For all of the foregoing reasons, Petitioner SALLY HUMMEL respectfully requests that this Honorable Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

LAW OFFICES OF
MARVIN M. MITCHELSON

By ______________________________
MARVIN M. MITCHELSON
Attorneys for Petitioner
SALLY HUMMEL

APPENDIX A

No. 81-1313
Dept. No. 4

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE
STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SALLY HUMMEL,
Plaintiff,

vs.

PETER HUMMEL,
Defendant.

DECISION

Sally Hummel filed suit for divorce February 10, 1981. The matter came on for trial August 23, 1982, and the testimony was completed August 27, 1982. The matter continued to October 7, 1982 for oral argument.

After motion and hearing the Court entered an Order on December 23, 1982, concerning the payment of certain income from oil and gas partnerships and the payment of assigned or pledged partnership interests income to the First National Bank of Dallas. Although that Order called for interim accountings of the partnership income, no accountings have been filed.

The Court finds that the parties were married June 27, 1952, in Reno, Nevada, are incompatible in marriage, and have one minor child of the marriage, Stephen (Edgar Stephen Cord Hummel), age 16. Each party sought the physical custody of Stephen. The cause of action for

divorce accrued while the parties were both domiciled in Washoe County.

The plaintiff remains in the home at 2140 Green Tree Lane, Reno, Nevada, which has been the family home for the past twenty years until the separation of the parties in 1981.

The Court finds that it is in the best interest of the minor child that his custody be awarded jointly to the parties and that physical custody remain with the plaintiff; defendant to have reasonable rights of visitation.

Each party has a duty to support the minor child. The allocation of that duty by the Court must take into account the relative circumstances of the parties. The plaintiff has separate trust fund income in the neighborhood of $200,000 per year, together with other income. The defendant whose profession is a petroleum geologist has undetermined income, and although some comments were made at trial concerning the affect of the "oil glut" upon the family gas and oil partnerships and leases, the exact affect upon the Hummel interest and income is unknown. Providing the necessities of life for Stephen has to be a very minor financial concern of the plaintiff. Any reasonable sum ordered for child support from the defendant would be a token to show is responsibility for the child.

Defendant shall pay to the plaintiff for the support and maintenance of the minor child, Stephen, during his minority the sum of $100.00 per month, from September 1, 1982.

In April 1961 the parties acquired as joint tenants approximately five acres of land on Green Tree Lane. They thereafter built a house having more than seven thousand square feet of living area. The house was par-

tially financed from bank loans and from plaintiff's separate income, and both parties over the years employed their own efforts and skills in improving the house and landscaping. During the construction of the home in October 1961 defendant executed a Note for $20,000 to plaintiff. The Note did not bear interest and was payable on demand. The plaintiff testified that the Note represented some sort of an agreement concerning her separate property and the use of her separate income for family expenses.

In May 1977 defendant executed a Quitclaim Deed in favor of plaintiff to the house at 2140 Green Tree. The explanation for that transaction in the record is not crystal clear. Apparently money was borrowed against the house from the bank. Whether the money was used for oil and gas exploration, drilling leases or partnerships to pay family income tax obligations or for other purposes is unclear. In any event, as part of that loan transaction the Quitclaim Deed was executed by defendant. Although contrary to some of the testimony the Court has to conclude and find that the 1977 Quitclaim Deed was in recognition that the substantial part of the money used to purchase and build the house on and improve the Green Tree property was plaintiff's separate funds and that that property was being pledged for money to develop the oil and gas business which would be community property. That the Deed was in consideration of the proceeds of the loan being used to enhance and further community property endeavors.

At the trial plaintiff sought to establish that she never intended any of her separate funds to be diverted to the oil and gas business or defendant's petroleum geological consulting business and that she always expected defendant to support the family and that she had never in-

tended a gift to the community of the living household expenses paid from separate trust fund income. She seeks reimbursement to her from the community or from defendant for these sums expended over the past twenty-five years. To some extent this is inconsistent with her position that all of the oil and gas partnerships and leases are her separate property, having been acquired with her separate income.

The early portions of the trial were devoted wholly to testimony from accounts for Arthur Young & Company tracing trust fund income into the various bank accounts maintained by the parties and by Peter Hummel. An elaborate analysis was made of the transfer of funds from the main household account (building account) to revolving bank loans at the First National Bank of Nevada (now First Interstate Bank) from the Main Branch account where oil royalties were deposited to the petroleum geology account, defendant's business account, and from savings accounts. Some of this information is summarized on Plaintiff's Exhibit CCC which shows that from 1970 to 1979 $486,400 of separate income was channeled into the oil and gas business. The exhibit also shows for the years 1970 through 1979 the oil and gas business afforded the parties an additional tax shelter in the amount of $331,199. The exhibit further shows from the years 1958 through 1979 a total tax sheltered income resulting from oil and gas activities in the sum of $427,080. The tax sheltered income may have been more. Pennell, Kerr & Forster, CPAs who did the tax returns from 1975 through 1978 claim that during those years the tax shelter benefits to the parties from the oil and gas business were $224,062, as compared to Arthur Young's figure for the same years of $183,166.

Late in 1979 plaintiff terminated the direct deposits of trust income to joint bank accounts and assumed direct control of all her separate income. Although eligible to sign a joint income tax return with defendant for the year 1980, she elected to file a separate return. Exhibits 7 and 8 show that by refusing to file a joint return with defendant she was obliged to pay additional Federal income taxes of $22,500. Those exhibits also show that in 1980 she took a charitable contribution deduction for $3,400 donated to the Boy Scouts of America, and included in her gross income was $117,146 from oil and gas partnerships created through the efforts of the defendant. Through depletion allowances $32,129 of that income was tax sheltered, showing an income from gas and oil businesses of $85,017. In addition to these substantial cash benefits, plaintiff also has direct partnership interest in six oil and gas partnership, and a community interest in twenty-four oil and gas leases.

Various bank signature cards showing joint tenancy accounts were admitted into evidence. Plaintiff admitted signing all except the lease rental account signature card dated August 1977. She, however, testified that the cards were signed as an accommodation and that she did not intend by signing the cards to make any deposits from her separate income as either joint or community property.

The history of the marriage, however, does not support plaintiff's present position which she has taken since substantial animosity has arisen between the parties. For many years, through 1979, the parties filed joint tax returns, the plaintiff accepting any tax benefits resulting from the oil and gas business, accepting deductions for contributions for the Boy Scouts and other charities.

Plaintiff at oral argument cited a number of cases, some of which are set forth in the trial statements. *Fox v.*

Fox, 81 Nev. 186; *Ormachea v. Ormachea*, 67 Nev. 273; *Cord v. Cord*, 98 Nev. A.O. 65; *Sly v. Barnett*, 97 Nev. 587; *Peters v. Peters*, 92 Nev. 687; *Todkill v. Todkill*, 88 Nev. 231; *Waldman v. Waldman*, 97 Nev. 546.

None of these cases support the contentions argued by plaintiff's counsel, except perhaps the effectiveness of the 1977 Quitclaim Deed from husband to wife to the family home. For over twenty years the plaintiff at least acquiesced in the conduct of the oil and gas and petroleum geology consulting business. She had full opportunity during many of those years to seek the advice of her father and his accountants and lawyers or to take the action that she took late in 1979 terminating payment of her separate trust income to the joint household accounts (building account).

The Court finds that with the possible exception of imprudent gifts made by defendant to his secretary and office manager, Mary Ann Sanchez, during the years 1978 through 1981, there is no evidence of any misconduct or of any dishonest or improper activities on the part of Peter Hummel.

In *Ormachea v. Ormachea*, and *Fox v. Fox*, the Court held that it is not required that an exact equal distribution of community property be made. The Court also held that where no attempt was made to keep separate and community property segregated and that at the time of trial it becomes impossible to determine what is community and what is separate, properties are to be considered community properties. Admittedly, these two cases deal with situations where the husband is claiming separate property and the husband is also manager of the community or community business. It is difficult to apply them against the defendant in this case where for twenty years plaintiff openly acquiesced as previously stated.

In Cord v. Cord, supra, the Court cited *See v. See*, 51 Cal Rptr. 888, 415 P2d 776, and quoted that opinion as follows:

> "A husband who elects to use his separate property instead of community property to meet community expenses cannot claim reimbursement. In the absence of an agreement to the contrary the use of his separate property by a husband for community purposes is a gift to the community."

Making application to the instant case, substitution of wife for husband should not in any way change the rule.

At the trial of the case, although the record shows that plaintiff incurred $67,000 in accountant fees with Arthur Young & Company, no evidence was produced by the plaintiff to establish the estimated value of any of the twenty-four active oil and gas leases or the value of the partnership interest in the six partnerships or to evaluate the defendant's position in the Hummel Wells Joint Venture. Although plaintiff's counsel pressed defendant during the trial to render his opinion as to the value of any of these assets, he refused to render such an opinion and claimed that he had none as it was not possible to accurately value these kinds of properties. This situation is further complicated by two other sets of facts.

With regard to Hummel Wells Joint Venture some of the documents in the exhibits (there are 82 exhibits, with an estimated 2,000 pages) indicate that defendant was a one-third owner or had a one-third interest in the Hummel Wells Joint Venture properties; Mr. Frank Wells having a two-third interest. Hummell Wells Joint Venture committed itself to certain drilling programs and Frank Wells advanced drilling costs, not only on his own behalf, but also on behalf of Peter Hummel. Any production from

Hummel Wells Joint Venture properties would first go to repay defendant's proportionate share of the drilling costs, variously stated in the testimony as between $400,000 and $733,000. Compare Exhibit P.

The second complication arises in relation to the 1980 loan negotiated by defendant from the First National Bank of Dallas, after plaintiff withdrew her guarantee of loans at the First National Bank of Nevada. Apparently from time to time plaintiff signed continuing guarantees for loans made by Peter Hummel to further the oil and gas and consulting geology business. One was signed April 28, 1978, in conjunction with a $222,000 loan from the First National Bank of Nevada. That loan was paid down and refunded on March 12, 1979. A $132,000 note with a balance of $72,000 was refunded for a note of $160,000, and according to Exhibit D, shows an additional $18,000 note from First National Bank dated April 17, 1979. The record may show, but the Court cannot readily establish, what the balance was when it was paid off by the proceeds from the First National Bank of Dallas loan of May 19, 1980. At the trial in August 1982 testimony indicated that the balance due to First National Bank of Dallas on the loan was $316,000.

To secure the Dallas loan defendant pledged the proceed from his general and limited partnership interest in Intermountain Petroleum, a Limited partnership (a 10% general partner and a 22.5% limited partnership interest) and six oil and gas leases in Campbell County, Wyoming, Federal No. 39170, May 1, 1973, 320 acres, Wyoming 72-6768, April 2, 1972, 40 acres, Federal 9392, December 1, 1967, 240 acres, Federal 9393, December 1, 1967, 80 acres, Wyoming No. 67-18806, January 6, 1966, 640 acres, and Moore Mineral Tract Lee Lease, March 12, 1968, 600 acres.

The remaining oil and gas and petroleum geology assets include eighteen additional oil and gas leases and five additional limited partnership as follows.

Leases held in the name of Peter W. Hummel (Exhibit 15)

Lease Number	County and State	Acres
W-62606	Weston, Wyoming	960.00
W-64007	Weston, Wyoming	600.00
W-63043	Campbell, Wyoming	80.00
W-62032	Natrona, Wyoming	318.88
ES-15222	Newaygo, Michigan	646.45
ES-15557	Newaygo, Michigan	1,616.20
ES-13596	Wayne, Mississippi	1,141.60
U-39214	Emery and Grand, Utah	511.48
U-43378	Uintah, Utah	40.00
C-25919	San Miguel, Colorado	601.47
M-26718	Treasure, Montana	2,245.18
M-25686	Toole, Montana	480.00
M-34936	Phillips, Montana	309.05
	Total	9,550.31

Leases held in the name of Sally C. Hummel (Exhibit 16)

W-30914	Park, Wyoming	960.00
W-62076	Park, Wyoming	320.00
77-0644	Natrona, Wyoming	80.00
78-0827	Park, Wyoming	200.10
ES-10344	Smith, Mississippi	40.50
	Total	1,600.60

Partnerships	Original Interest
Western Petroleum Company, L.P.	
Peter W. Hummel, G.P.	10.00%
Peter W. Hummel, L.P.	20.80%
Sally C. Hummel, L.P.	20.00%
	50.80%

Partnerships	Original Interest
Pecos River Petroleum Company, L.P.	
Peter W. Hummel, G.P.	10.00%
Peter W. Hummel, L.P.	21.60%
Sally C. Hummel, L.P.	21.60%
	53.20%
Tidelands Energy Company, L.P.	
Peter W. Hummel, G.P.	10.00%
Peter W. Hummel, L.P.	24.00%
Sally C. Hummel, L.P.	20.00%
	54.00%
Delta Exploration Company, L.P.	
Peter W. Hummel, G.P.	12.00%
Peter W. Hummel, L.P.	22.00%
Sally C. Hummel, L.P.	22.00%
	56.00%
Energy Production Company, L.P.	
Peter W. Hummel, G.P.	12.00%
Peter W. Hummel, L.P.	21.12%
Sally C. Hummel, L.P.	22.00%
	55.12%

As stated above, plaintiff claims these assets as her separate property and the defendant asserts that they are community property. On the basis of the foregoing comments, the Court finds that they are community property. *See v. See*, supra.

The limited partnerships shown on Defendant's Exhibit 10 present a special problem. The several partnership agreements list the parties along *with others* as limited and general partners. This Court is of the opinion that it has no authority to change the legal relationship as set forth in the several partnership agreements. The contractual relationships with third parties should not be altered. Limited partners do not participate in the management of the partnership affairs. General partners have special

duties and liabilities. It seems reasonable that plaintiff could continue her ownership in the limited partnerships. The Court, however, finding that these partnership interests are community property must hold that any partnership profits accruing to the parties from Western Petroleum Company, Delta Exploration Company, and Energy Production Company, be distributed on the basis of the total ownership of Peter W. Hummel and Sally C. Hummel as set forth in Exhibit 10, that is from the total partnership distribution to the parties one-half thereof will be distributed to plaintiff.

Intermountain Petroleum Company presents a different problem inasmuch as Peter W. Hummel's limited partner in general partnership shares or the proceeds therefrom have been pledged as security for the Dallas FNB note. Plaintiff has denied any liability of any kind or any connection of any kind with regard to this loan. The repayment of the loan diminishes the value of the partnership interest to defendant. On the other hand, the Court has no idea as to the value of this limited partnership. For these reasons and to minimize future conflict between the parties, the Court awards as separate property to Peter W. Hummel his 10% general partnership interest and his 22.50% limited partnership interest. Sally C. Hummel retains her 25.20% interest in Intermountain Petroleum.

The twenty-four leases are also found to be community property. Defendant in argument offered that the leases be segregated into two halves and that plaintiff be given an option to pick one-half of the leases. Again, there being no estimates of value of any of the leases, should the Court segregate them on a lease basis or on an acreage basis, and what special consideration should be given to the six leases pledged to secure the Dallas FNB note? Both parties purposely declined to provide any evidence

of the value of the partnership and the leases, electing, so to speak, to put all their eggs in one basket. In view of the animosity between the parties, community interest must be separated as much as possible. The parties will have to live with some more or less arbitrary decisions by the Court. Because the pledged leases are awarded to the defendant for the reasons herein set forth, the other leases cannot be divided equally thereby affording plaintiff an opportunity to select one-half. Therefore, the Court will have to make an arbitrary division of the leases on an acreage basis.

The eighteen assorted leases cover 11,150 acres and the six Campbell County pledged leases cover 1,920, for a total of 13,070 acres covered by oil and gas leases. This Court in its interim Order, dated December 23, 1980, ordered pursuant to the pledge and assignment agreements executed by defendant in favor of FNB-Dallas, that the proceeds from defendant's interest in Intermountain and from the six pledged leases be paid to the Bank.

The pledged leases are as follows: Federal Lease 39170, 320 acres, Wyoming No. 6718806, 640 acres, Wyoming 72-6768, 40 acres, Federal 9392, 240 acres, Federal 9393, 80 acres, and Moore Mineral Trust, 600 acres. These leases are awarded to the defendant as his separate property. Also awarded to defendant as his separate property are Leases No. W-62606, Weston, Wyoming, 960 acres, No. W-64007, Weston, Wyoming, 600 acres, No. W-62032, Natrona Wyoming, 318.88 acres, No. M-26718, Treasure, Montana, 2,245.18 acres, No. M-25686, Toole, Montana, 480 acres, for a total, including pledged leases, of 6,523 leased acres.

Plaintiff is awarded as her separate property the five leases in her name listed in Exhibit 16 (1,600.60 acres) and leases No. W-63043, Campbell, Wyoming, 80 acres,

No. ES-15222, Newaygo, Michigan, 646.45 acres, No. ES-15557, Newaygo, Michigan, 1,616.20 acres, No. ES-13596, Wayne, Mississippi, 1,141.60 acres, No. U-39214, Emery and Grand, Utah, 511.48 acres, No. U-43378, Uintah, Utah, 40 acres, No. C-25919, San Miguel, Colorado, 601.47 acres, and No. M-34936, Phillips, Montana, 309.05 acres, for a total of 6,544 leased acres.

Again to minimize future conflicts between the parties, the Court is requiring defendant to pay the FNB-Dallas note and to hold plaintiff harmless from liability thereon. By holding that all the oil and gas assets are community property, this note must be declared a community debt as the funds (prior notes refunded) were used in furtherance of the Hummel oil and gas business.

Plaintiff's share of this debt is $158,000. Defendant asserts that community capital has been invested in the Hummel Wells Joint Venture in the sum of $266,000 as of August 1982 (not shown on Exhibit P, but there may be other evidence in the record). Plaintiff's share of this contribution is $133,000. Again, as many of these findings are based on estimates or are arbitrary by necessity, this Court's decision contemplates defendant's liability on the FNB-Dallas note offsets the community contribution to Hummel Wells awarded to defendant.

Again, the Court having no way of estimating the value of Hummel Wells Joint Venture and Hummel having substantial liabilities to Wells for funds advanced for drilling costs, the Hummel Wells Joint Venture assets are awarded to defendant as his separate property.

During the marriage plaintiffs father, E.L. Cord, made substantial gifts to each party and to the community. The parties apparently agree that the stocks held at Paine

Webber Company in the name of Peter W. Hummel are defendant's separate property.

The 1% general partnership interest in Tide Petroleum is awarded to defendant as his separate property. The 1978 Cadillac El Dorado and the 1981 Chevrolet Monte Carlo (apparently an asset of Tide Petroleum) is awarded to the defendant.

The following items of personal property are awarded to defendant as his separate property:

Trapshooting trophies and plates, silver GP measuring cups, California Indian memorabilia (in Bar at Green Tree home), stereo set (in living room at Green Tree home), saddle, bridles and blankets, foreign coins in brandy snifter, Hummel crest in mahogany frame, horse trophies and framed certificates, gold jewelry belonging to defendant's father: cuff links, money clip, tie clip, Pateck Phillipe wrist watch, gold and black watch, and other miscellaneous items of plaintiff's personal jewelry, golf putting iron, miscellaneous Boy Scout memorabilia and records (stored in water room and barn and garage at Green Tree), Boy Scout horse trailer, Boy Scout generator, Boy Scout camping equipment and storage shed, Boy Scout 14 foot aluminum rowboat, Boy Scout pipe rack for Scout truck, three complete Boy Scout uniforms, and all other items of tangible personal property now in his possession.

All other items, including the horses and the automobiles which have not been given to the children of the parties, pianos, rights to trust property and income at Security Bank, stocks, bonds, and securities held in the name of Sally Hummel, the Green Tree home and the Riverbend condominium, furniture, fixtures and appli-

ances located at the Green Tree home, are confirmed as plaintiff's separate property.

Plaintiff shall pay as her separate debt any notes secured by the Green Tree property and the condominium.

Upon separation of the parties, January 1, 1981, there was a MasterCharge liability which the bank has been enforcing collection of the balance from defendant. Any charges made by the plaintiff on that MasterCharge account, or other liabilities incurred by her since January 1981, are her separate debts. Any other debt incurred by plaintiff for her personal benefit or for assets in her possession are her separate debts.

Any debts incurred by defendant in his name are his separate debts.

Plaintiff shall assume and pay the statement for preparation of her 1980 income tax by Pannell, Kerr and Forster in the sum of $4,150, and any 1980 income taxes assessed for non-oil business income.

To any extent that the First National Bank of Dallas note is not paid by proceeds from the pledged assets or the pledged assets are insufficient to pay that note in accordance with its terms, defendant shall be responsible for paying said note.

As stated above the gifts of community property to Mary Ann Sanchez by the defendant were not made with the implied consent of the plaintiff. NRS 123.230. The Court has found substantial community property and has attempted to distribute the same btween the parties, having little or no idea of the value of most of this property. To attempt to equalize the community distribution by ordering the payment of a few thousand dollars as

the plaintiff's community share of the authorized gifts does not seem to this Court justified.

Neither party is entitled to alimony.

A draft of a tentative Decision in this matter was submitted to the parties, asking them to review the Decision and point out to the Court any assets not covered by the Decision which may have been inadvertently omitted and any assets which are agreed by the parties to be either separate property or community property.

Exhibit U contained partnership agreements for Alaska Offshore Petroleum Company, formed July 1970, and Dixie Gulf Petroleum Company, formed November 1968. According to the partnership agreements each of the parties was a 20% partner. Defendant asserts that they have no value. He states the leases have been assigned or sold or expired. However, he has no objection to the Court's making distribution.

The Court finds that each party shall have 20% interest in each of the above partnerships as his or her separate property.

Exhibit 2 contained a list of 23 leases assigned by Peter Hummel between July 1972 and February 1982. Exhibit 2 came into evidence on the cross-examination of Brian Strom, one of plaintiff's CPA witnesses. Strom testified that sales of oil and gas leases produced gross cash receipts of $240,339. The Court's notes do not show that Peter Hummel was ever asked to testify about Exhibit 2. However, the document is entitled "Peter Hummel Leases, Assigned." The face of the exhibit contains an item or listing of "overriding royalties".

At the conference defendant indicated that all the leases in Exhibit 2 expire within ten years of their date;

that some have already expired. However, he has no objection to assigning the royalty income as community property. One-half (½) any such royalty income is awarded to each party as separate property.

Defendant shall execute a blanket assignment with reference to Defendant's Exhibit 2 of one-half (½) of the overriding royalties to the plaintiff. Such assignment shall be in such form as will ordinarily be acceptable by persons in the oil and gas business.

Plaintiff claims that there is substantial community property in the form of oil and gas leases and partnerships not previously distributed which can be found in Exhibits F and G. Although F and G were admitted into evidence in a package of about twenty exhibits, Brian Strom, plaintiff's CPA, only testified that he could not match the leases and partnerships listed in Exhibit F with the material found in the five boxes of records produced by the defendant. The Court's notes do not show that defendant was ever asked about Exhibit F or the significance of its contents.

The Defendant, Peter Hummel, testified that Exhibit G was a list of lottery-acquired leases used by him as a record of when rental payments were due and that the list contained leases which belonged to the Hummel children, to clients of the consulting geology business, as well as leases owned by plaintiff and the defendant.

Plaintiff complains about the Court's treatment of the Hummel Wells Joint Venture properties, asserting among other things, that there is no formal joint venture agreement between Hummel and Frank Wells in evidence. Plaintiff by her own Exhibits F and P show substantial oil and gas properties belonging to Hummel Wells. Exhibit P shows that of the $2,331,082 paid to Wood Petroleum by

Hummel Wells (for drilling) $15,281 was contributed directly by cash from the Hummels and $733,317 came from "Loans Hummel". The only other definitive evidence about Hummel Wells came from the testimony of defendant Peter Hummel. His testimony supports all the findings made by the Decision of the Court.

Plaintiff suggests that additional testimony now be taken. The case was tried for a week and Frank Wells was not called as a witness nor was his deposition offered at the trial. Plaintiff has made no showing that there is evidence now available which they could not have produced at trial.

Plaintiff also makes reference to Exhibit TT and Exhibit S as establishing property not disposed of. Plaintiff's evidence does not overcome the testimony of Peter Hummel that Exhibit TT is a list of Hummel Wells assets.

Plaintiff claims that the leases set forth in Exhibit 8 to the depositions and Exhibit 11-C to the deposition, Exhibit S, contain descriptions of assets not distributed. The deponent, Michael Pruitt, stated that the leases listed on Exhibit 8 to the deposition involve Frank Wells. In coupling this with the testimony of defendant, the Court must find that these are part of the Hummel Wells assets.

Exhibit 11-C to Pruitt's deposition lists six decimal interests in Wells under Wood Petroleum agreement. However, the Court cannot draw the inference from that listing that those are Wells' or properties not included in the Hummel Wells assets or the other leases or partnerships already divided between the parties. The record does not show that Peter Hummel was asked to testify about the contents of Exhibit S.

The evidence including defendant's testimony supports a finding that the leases and partnerships referred to in Michael Puritt's deposition, Exhibit S, are partnerships previously distributed by this Decision, are Hummel Wells assets or are Tide Petroleum assets.

Plaintiff also asserts that Exhibit 00 contain leases or rights that are community property. The document contains no title, but appears to be some kind of a typed list of the legal description of various oil and gas leases. It came into evidence through testimony of Peter Hummel as an adverse witness, who stated that it was a report from an oil and gas service.

Attorney for defendant shall prepare Findings of Fact, Conclusions of Law, and Judgment granting a divorce to plaintiff in accordance with this Decision.

This Decision may be incorporated by reference as Findings of Fact and Conclusions of Law in the formal Findings of Fact, Conclusions of Law, and Judgment if counsel for plaintiff elects to do so.

Each party shall pay his or her own attorney's fees, court costs, trial preparation and accounting fees.

DATED: This 10 day of November, 1983.

District Judge

No. 81-1313
Dept. No. 4

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE
STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SALLY HUMMEL,
Plaintiff,
vs.
PETER HUMMEL,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT AND DECREE

This cause came on for trial on the merits on August 23, 1982, and the testimony was completed August 27, 1982. The matter was continued to October 7, 1982, for oral argument. Plaintiff appeared in person together with her attorneys, PAUL D. ELCANO, JR., ESQ., and PAUL M. MAHONEY, ESQ., of JONES, MAHONEY & BRAYTON, and Defendant appeared in person together with his attorney, EUGENE J. WAIT, JR., ESQ., of EUGENE J. WAIT, JR., A Professional Corporation. Oral and documentary evidence was adduced, and the matter was submitted. The Court being fully advised in the premises rendered its written Decision on November 10, 1983, and, based upon the testimony given, the evidence submitted, and the briefs of counsel, the Court hereby makes the following Findings of Fact, Conclusions of Law and Judgment and Decree.

FINDINGS OF FACT

1. At the time the cause of action for divorce accrued, each of the parties was a resident of, and domiciled in, Washoe County, Nevada, and each are now and for more than six (6) weeks preceding the filing of plaintiff's complaint herein have been actual, bona fide residents and domiciliaries of the State of Nevada and have been physically and corporeally present in the State of Nevada each and every day for a period of six weeks prior to the filing of plaintiff's complaint in this case and cause.

2. The parties were married in Reno, Nevada, on June 27, 1952, and ever since have been and now are husband and wife.

3. There is one minor child of the marriage, namely Edgar Steven Cord Hummel, born May 17, 1967.

4. Since the marriage of the parties, the plaintiff and defendant have become incompatible in marriage, in that diverse disputes and differences have arisen between them to the extent that they cannot live together peacefully and happily as wife and husband.

5. The plaintiff resides in the home at 2140 Green Tree Lane, Reno, Washoe County, Nevada.

6. The parties resided in the family home during the past twenty years until the separation of the parties in 1981.

7. The defendant resides separately from the plaintiff and each of the parties wishes to continue to do so.

8. Each of the parties desires the physical custody of the minor child.

9. It is in the best interest of the minor child of the parties that his custody be awarded to the parties jointly,

and that physical custody remain with the plaintiff; defendant to have reasonable rights of visitation.

10. The sum of ONE HUNDRED DOLLARS ($100.00) per month is a reasonable sum for defendant to pay to plaintiff toward the support and maintenance of the minor child during his minority, from September 1, 1982.

11. The plaintiff has separate trust fund income in the neighborhood of $200,000 per year together with other income.

12. In April, 1961, the parties acquired as joint tenants approximately five acres of land on Green Tree Lane in Reno, Nevada.

13. The parties built a house on the Green Tree Lane property and both parties over the years employed their individual efforts and skills in improving the house and landscaping.

14. In May, 1977, defendant executed a Quitclaim Deed in favor of plaintiff to the house at 2140 Green Tree Lane in Reno, Nevada.

15. For many years, through 1979, separate property trust income of plaintiff was deposited to joint bank accounts of the parties which accounts were used for various family activities, including living expenses, the family oil and gas business, charitable contributions, and the payment of income taxes.

16. For many years, through 1979, the parties filed joint income tax returns through which plaintiff accepted many tax benefits resulting from the oil and gas business and accepted deductions for contributions for the Boy Scouts and other charities.

17. For approximately twenty (20) years, the plaintiff acquiesced in the deposits of her separate property trust income into the joint bank accounts of the parties and the comingling of those funds with oil business funds and the community property funds of the parties.

18. For approximately twenty (20) years, the parties did not attempt to segregate deposits of separate property income of plaintiff and defendant and community property income into the joint bank accounts of the parties.

19. The Court does not make a finding with respect to the separate property income deposits, or the oil royalty deposits, or the tax sheltered income resulting from the Hummel oil and gas business.

20. In the year 1980, the parties were eligible to sign and file a joint federal income tax return.

21. In the year 1980, plaintiff elected to file a separate federal income tax return in which she claimed a charitable contribution deduction for $3,400 donated to the Boy Scouts of America and included in her gross income was $117,146 from oil and gas partnerships created through the efforts of the defendant.

22. In the separate federal income tax return filed by plaintiff in the year 1980, through depletion allowances from the family oil and gas business a total of $32,129 of the reported income was tax sheltered, showing an income from the family oil and gas business of $85,017.

23. All of the bank signature cards of the parties showed joint tenancy accounts signed by both plaintiff and defendant, except the Lease Rental Account signature card dated August, 1977.

24. The signing of the joint tenancy bank signature cards by plaintiff is evidence of her acquiescence in the deposits of her separate property trust income into those joint bank accounts and her acquiescence in the comingling of those deposits with the community funds of the parties.

25. The plaintiff acquiesced in the operation and conduct of the Hummel oil and gas business and the petroleum geology consulting business by defendant until 1979.

26. For over twenty years prior to the year 1979, the plaintiff had full opportunity to terminate payment of her separate property trust income into the joint tenancy bank accounts, including the household building account.

27. For over twenty years the plaintiff had full opportunity to seek the advice of her father and his accountants and lawyers, or to take the action that she took late in 1979.

28. The plaintiff, who acquiesed in the use of her separate property trust income instead of community property to meet community expenses, waived any claim for reimbursement from the community.

29. In the absence of an agreement to the contrary between the parties, the plaintiff's acquiesence in the use of her separate property trust income by the defendant for community purposes is a gift to the community.

30. No evidence was produced in trial to establish the estimated value of any of the twenty-four active oil and gas leases or the value of the partnership interests of the parties in the six partnerships, or to evaluate the defendant's position in the Hummel Wells Joint Venture composed of Peter Hummell and Frank Wells.

31. The Hummel Wells Joint Venture committed itself to certain drilling programs and Frank G. Wells contributed most of the drilling costs of the Joint Venture.

32. Any production from the Hummel Wells Joint Venture properties would first be allocated to Frank G. Wells in the correct amount and thereafter to Frank G. Wells and Peter W. Hummel as their interests appear.

33. A portion of the funds from a 1980 loan negotiated by defendant from First National Bank of Dallas were used to retire a preexisting loan from the First National Bank of Nevada, which had been guaranteed in writing by the plaintiff.

34. Funds from the 1980 loan negotiated by defendant from the First National Bank of Dallas were used for drilling oil and gas properties resulting in tax benefits to both parties.

35. The balance of the 1980 loan negotiated by defendant from the First National Bank of Dallas was $316,000 in August, 1982.

36. To secure the 1980 loan negotiated by defendant from the First National bank of Dallas, defendant pledged his general and limited partnership interests in Intermountain Petroleum, a Limited Partnership (10% general partner and a 22.5% limited partnership interest) and six oil and gas leases in Campbell County, Wyoming, Federal No. 39170, May 1, 1973, 320 acres; Wyoming 72-6768, April 2, 1972, 40 acres; Federal 9392, December 1, 1967, 240 acres; Federal 9393, December 1, 1967, 80 acres; Wyoming No. 67-18806, January 6, 1966, 640 acres; and Moore Mineral Tract Fee lease, March 12, 1968, 600 acres.

37. The many oil and gas and petroleum geology assets of the parties include eighteen additional oil and gas leases and five additional limited partnerships as follows:

Leases held in the name of Peter W. Hummel (Exhibit 15)

Lease Number	County and State		Acres
W-62606	Weston, Wyoming		960.00
W-64007	Weston, Wyoming		600.00
W63043	Campbell, Wyoming		80.00
W-62032	Natrona, Wyoming		318.88
ES-15222	Newaygo, Michigan		646.45
ES-15557	Newaygo, Michigan		1,616.20
ES-13596	Wayne, Mississippi		1,141.60
U-39214	Emery and Grand, Utah		511.48
U-43378	Uintah, Utah		40.00
C-25919	San Miguel, Colorado		601.47
M-26718	Treasure, Montana		2,245.18
M-25686	Toole, Montana		480.00
M-34936	Phillips, Montana		309.05
		Total:	9,550.31

Leases held in the name of Sally C. Hummel (Exhibit 16)

W-30914	Park, Wyoming		960.00
W-62076	Park, Wyoming		320.00
77-0644	Natrona, Wyoming		80.00
78-0827	Park, Wyoming		200.10
ES-10344	Smith, Mississippi		40.50
		Total:	1,600.60

Partnerships	Original Interests
Western Petroleum Company, L.P.	
Peter W. Hummel, G.P.	10.00%
Peter W. Hummel, L.P.	20.80%
Sally C. Hummel, L.P.	20.00%
	50.80%
Pecos River Petroleum Company, L.P.	
Peter W. Hummel, G.P.	10.00%
Peter W. Hummel, L.P.	21.60%
Sally C. Hummel, L.P.	21.60%
	53.20%
Tidelands Energy Company, L.P.	
Peter W. Hummel, G.P.	10.00%
Peter W. Hummel, L.P.	24.00%
Sally C. Hummel, L.P.	20.00%
	54.00%
Delta Exploration Company, L.P.	
Peter W. Hummel, G.P.	12.00%
Peter W. Hummel, L.P.	22.00%
Sally C. Hummel, L.P.	22.00%
	56.00%
Energy Production Company, L.P.	
Peter W. Hummel, G.P.	12.00%
Peter W. Hummel, L.P.	21.12%
Sally C. Hummel, L.P.	22.00%
	55.12%

38. The assets described in the paragraphs 30, 36, 37 and 40 of these findings acquired during the marriage are the community property of the parties.

39. The partnership disbursements of Western Petroleum Company, L.P., Pecos River Petroleum Company, L.P., Tidelands Energy Company, L.P., Delta Exploration Company, L.P., and Energy Production Company, L.P., as the community property of the parties shall be

allocated one-half to Sally C. Hummel and one-half to Peter W. Hummel.

40. Each of the parties shall have a twenty percent (20%) interest in the Alaska Offshore Petroleum Company and the Dixie Gulf Petroleum Company, as separate property.

41. The limited partnership interest (22.5%) and the general partnership interest (10%) of Peter W. Hummel in Intermountain Petroleum Company having been pledged as security for the loan from the First National Bank of Dallas is awarded to him as his separate property.

42. The limited partnership interest of Sally C. Hummel in Intermountain Petroleum Company is awarded to Sally C. Hummel as her separate property.

43. The twenty-four oil and gas leases described in paragraph 38 are the community property of the parties.

44. The twenty-four oil and gas leases can be set aside to the parties on an acreage basis.

45. The six leases pledged to secure the loan from First National Bank of Dallas, paragraph 36 above, are set aside to defendant as his separate property.

46. The eighteen oil and gas leases and the six oil and gas leases total 13,070 acres.

47. The pledged leases described are described as follows: Federal Lease 39170, 320 acres; Wyoming No. 6718806, 640 acres; Wyoming 72-6768, 40 acres; Federal 9392, 240 acres; Federal 9393, 80 acres; and Moore Mineral Trust, 600 acres.

48. A total of 6,523 leased acres are set aside to the defendant as his separate property, consisting of the

pledged leases and Leases No. W-62606, Weston, Wyoming, 960 acres: No. W-64007, Weston, Wyoming, 600 acres; No. W-62032, Natrona, Wyoming, 318.88 acres; No. M-26718, Treasure, Montana, 2,245.18 acres; No. M-25686, Toole, Montana, 480 acres, for a total, including the pledged leases, of 6,523 leased acres.

49. A total of 6,544 leased acres are set aside to plaintiff as her separate property, including the five leases in her name described in paragraph 37 hereinabove, and leases W-63043, Campbell, Wyoming, 80 acres; No. ES-15222, Newaygo, Michigan, 646.45 acres, No. ES-15557, Newaygo, Michigan, 1,616.20 acres; No. ES-13596, Wayne, Mississippi, 1,141.60 acres; No. U-39214, Emery and Grand, Utah, 511.48 acres; No. U-43378, Uintah, Utah, 40 acres; No. C-25919, San Miguel, Colorado, 501.47; and No. M-34936, Phillips, Montana, 309.05 acres.

50. The loan from the First National Bank of Dallas is a community debt.

51. By setting aside the assets pledged to secure the loan from First National Bank of Dallas to Peter W. Hummel, the Court can direct defendant to discharge that loan and hold harmless plaintiff from any liability thereon.

52. By directing the defendant to pay the plaintiff's share of the community property debt in the amount of approximately $158,000, the Court can offset this obligation with the plaintiff's share of the community property contributions to the Hummel Wells Joint Venture in the amount of $133,000.

53. Royalty income, if any, on assigned leases is community property. One-half (½) of any royalty income on the "Peter Hummel Leases, Assigned" (Defendant's Ex-

hibit 2, in evidence in the trial of this action) is awarded to each party as separate property.

54. The stocks held at Paine Webber Company in the name of Peter W. Hummel are the separate property of defendant.

55. The one percent general partnership interest in Tide Petroleum is the separate property of defendant.

56. The 1978 Cadillac El Dorado is the separate property of defendant. Plaintiff has no interest in the 1982 Ford Bronco (registered in the name of Tide Petroleum).

57. The following items of personal property are awarded as the separate property of the defendant; Trapshooting trophies and plates, silver GP measuring cups, California Indian memorabilia (in Bar at Green Tree home), stereo set (in living room at Green Tree home), saddle, bridles and blankets, foreign coins in brandy snifter, Hummel crest in mahogany frame, horse trophies and framed certificates, gold jewelry belonging to defendant's father: cuff links, money clip, tie clip, Pateck Phillipe wrist watch, gold and black watch, and other miscellaneous items of plaintiff's personal jewelry, golf putting iron, miscellaneous Boy Scout generator, Boy Scout camping equipment and storage shed, Boy Scout 14 foot aluminum rowboat, Boy Scout pipe rack for Scout truck, three complete Boy Scout uniforms, and all other items of tangible personal property now in his possession.

58. The following items of personal property are the separate property of the plaintiff: All other items, including the horses and the automobiles which have not been given to the children of the parties, pianos, rights to trust property and income at Security Bank, stocks, bonds, and securities held in the name of Sally Hummel, the Green Tree Home, furniture, furnishings, fixtures and appli-

ances located at the Green Tree Lane home and any interest Plaintiff may have in the Riverbend Condominium.

59. Any notes wherein Plaintiff is a maker secured by the Green Tree Lane property or the condominium are the separate property debts of the plaintiff.

60. The liability on the Mastercharge account of plaintiff, upon separation of the parties on or about January 1, 1981, is the separate debt of the plaintiff.

61. Any other debt incurred by plaintiff for her personal benefit or for assets in her possession from January 1, 1981, are the separate debts of plaintiff.

62. Any debts incurred by defendant for his personal benefit or for assets in his possession from January 1, 1981, are the separate debts of defendant.

63. The statement for preparation of plaintiff's 1980 income tax return by Pannell, Kerr, Forster in the sum of $4,150 and any 1980 income taxes assessed in plaintiff's return for non-oil business income and any disallowed non-oil business deductions are the separate debts of the plaintiff.

64. To the extent that any part of the loan from the First National Bank of Dallas is not paid by proceeds from the pledged assets, or the pledged assets are insufficient to pay that loan in accordance with its terms, that obligation is the separate debt of the defendant.

65. Without the actual or implied consent of the Plaintiff, Defendant made gifts totalling several thousand dollars to Mary Ann Sanchez. The gifts were improper — NRS 123.230. The Court has found substantial community property and has attempted to distribute the same between the parties, having little or no idea of the

value of this property. Under these circumstances, to attempt to equalize the community distribution by ordering Defendant to pay a few thousand dollsrs is not justified.

66. Neither party is entitled to alimony.

67. Each of the parties has adequate resources to pay his or her own attorney's fees, court costs, trial preparation, and accounting fees.

68. The Court finds no necessity for any award of attorney's fees, court costs, trial preparation, and accounting fees to either party.

69. The Court can require the parties to execute such assignments, releases, quitclaim deeds, and checks as may be necessary to carry out the Judgment of this Court and make a mutual physical exchange of all of the same at a date and time and place agreed upon by the parties, or as directed by the Court.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, which Findings of Facts are specifically incorporated in these Conclusions of Law, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. The plaintiff and defendant are entitled to an absolute decree of divorce from each other upon the grounds of incompatibility.

3. This Court can award custody of the minor child of the marriage, determine visitation rights and obligations of support in accordance with the Findings of Fact, that

is, the custody of the minor child of the marriage should be awarded to the parties jointly, that physical custody should remain with plaintiff, that defendant should have reasonable rights of visitation and that defendant should be ordered to pay the sum of One Hundred Dollars ($100) per month to plaintiff toward the support and maintenance of the minor child during his minority, from September 1, 1982.

4. This Court can determine the community property of the parties and make a disposition thereof to the parties in accordance with law and the Findings of Fact of this Court.

5. This Court can determine the community debts of the parties and make a disposition thereof in accordance with law and the Findings of Fact of this Court.

6. This Court can determine the separate property of the parties and declare the same to be the separate property of the owner thereof and in accordance with the Findings of Fact of this Court.

7. This Court can determine the separate debts of the parties in accordance with the Findings of Fact of this Court.

8. All property rights and all other rights and obligations arising out and incident to the marriage of plaintiff and defendant should be in accordance with the terms and provisions of the aforementioned Findings of Fact which are hereby incorporated herein.

9. The plaintiff having acquiesed for a period in excess of twenty (20) years in the use of her separate property trust income by defendant instead of community property to meet community expenses cannot claim reimbursement.

10. In the absence of an agreement to the contrary between the parties, the use of the plaintiff's separate property trust income by the defendant for community purposes for a period in excess of twenty (20) years is deemed in law to be a gift by the plaintiff of that separate property trust income to the community.

11. This Court can set aside to defendant as his sole and separate property the oil and gas leases and the general and limited partnership interests in Intermountain Petroleum Company which are pledged to First National Bank of Dallas as security for its loan to Peter W. Hummel for community property purposes.

12. This Court can set aside to plaintiff as her separate property her 25.20% interest in Intermountain Petroleum Company.

13. The partnership disbursements of Western Petroleum Company, L.P., Pecos River Petroleum Company, L.P., Tidelands Energy Company, L.P., Delta Exploration Company, L.P., and Energy Production Company, L.P., to the parties should be allocated one-half (½) to each of the parties.

14. The twenty-four (24) oil and gas leases can be set aside to the parties on an acreage basis.

15. A twenty percent (20%) interest can be set aside to each of the parties in Alaska Offshore Petroleum Company and Dixie Gulf Petroleum Company as separate property.

16. The six (6) leases pledged to secure the loan from First National Bank of Dallas can be set aside to defendant as his separate property.

17. A total of six thousand five hundred forty-four (6,544) leased acres can be set aside to plaintiff as her separate property.

18. A total of six thousand five hundred twenty-three (6,523) leased acres can be set aside to defendant as his separate property.

19. The interests of Peter W. Hummel in the Hummel Wells Joint Venture can be set aside to Peter W. Hummel as his separate property.

20. The defendant can be ordered to discharge the loan from the First National Bank of Dallas as his separate debt over and above the assets pledged to secure the loan and to hold harmless plaintiff from any liability thereon.

21. The royalty income from the "Peter Hummel Leases, Assigned" (Defendant's Exhibit 2, in evidence in the trial of this action) can be awarded one half (½) to each of the parties as separate property and Peter Hummel should be ordered to assign an undivided one-half (½) interest in the overriding royalties from each of said leases as the separate property of plaintiff.

22. The stocks held at Paine Webber Company in the name of Peter W. Hummel can be set aside to the defendant as his separate property.

23. The 1% general partnership interests in Tide Petroleum can be set aside to defendant as his separate property.

24. The 1978 Cadillac Eldorado can be set aside to the defendant as his separate property. Plaintiff has no interest in the 1982 Ford Bronco registered to Tide Petroleum.

25. The personal property described in the Findings of Fact of this Court in paragraph 57 can be set aside to defendant as his separate property.

26. The items of personal property described in the Findings of Fact of this Court in Paragraph 58 can be set aside to plaintiff as her separate property.

27. The real property and improvements on Green Tree Lane, Reno, Nevada, can be set aside to plaintiff as her sole and separate property.

28. The cost of preparation of plaintiff's 1980 income tax return by Pannell Kerr Forster in a sum of $4,150 and any 1980 income taxes assessed in plaintiff's return for non-oil business income and disallowed non-oil business deductions can be awarded as Plaintiff's separate obligations.

29. Neither party should be awarded alimony.

30. Attorneys' fees, court costs, trial preparation or accounting fees to either party will not be ordered.

31. The Court can require the parties to execute such assignments, releases, quit claim deeds and checks as may be necessary to carry out the judgment of this Court and make a mutual, physical exchange of all of the same at a date and time and place agreed upon by the parties or as directed by the Court.

JUDGMENT AND DECREE OF DIVORCE

NOW, THEREFORE, and based upon the foregoing Findings of Fact and Conclusions of Law, and good cause appearing therefore, it is hereby ORDERED, ADJUDGED and DECREED, as follows:

1. Plaintiff and defendant be, and they hereby are, granted a decree of divorce one from the other, final and absolute in form, force and effect, the laws of the State of Nevada providing for no interlocutory period nor conditions or restrictions on remarriage; that the bonds of matrimony now and heretofore existing between the plaintiff and defendant be, and the same hereby are, dissolved, and the parties freed from the obligations thereof and restored to the status of unmarried persons.

2. Neither party is awarded alimony.

3. The custody of EDGAR STEPHEN CORD HUMMEL born May 17, 1967, is awarded to the parties jointly and the physical custody of the minor shall remain with the plaintiff with defendant to have reasonable rights of visitation.

4. The defendant is ordered to pay the sum of One Hundred Dollars ($100.00) per month from September 1, 1982, to plaintiff toward the support and maintenance of the minor child during his minority.

5. The approximately five (5) acres of land on Green Tree Lane and the improvements thereon and furniture, fixtures and appliances located therein are confirmed as plaintiff's separate property and plaintiff is ordered to hold harmless the defendant from any liability thereon.

6. Defendant has no interest in the Riverbend Condominium and the furniture, fixtures and appliances located therein.

7. The following items of personal property are awarded to defendant as his separate property:

Trapshooting trophies and plates, silver GP measuring cups, California Indian memorabilia (in Bar at Green Tree home), stereo set (in living room at Green Tree

home), saddle, bridles and blankets, foreign coins in brandy snifter, Hummel crest in mahogany frame, horse trophies and framed certificates, gold jewelry belonging to defendant's father: cuff links, money clip, tie clip, Pateck Phillipe wrist watch, gold and black watch, and other miscellaneous items of plaintiff's personal jewelry, golf putting iron, miscellaneous Boy Scout generator, Boy Scout camping equipment and storage shed, Boy Scout 14 foot aluminum rowboat, Boy Scout pipe rack for Scout truck, three complete Boy Scout uniforms, and all other items of tangible personal property now in his possession.

8. All other items of personal property are the separate property of the plaintiff:

All other items, including the horses and the automobiles which have not been given to the children of the parties, pianos, rights to trust property and income at Security Bank, stocks, bonds, and securities held in the name of Sally Hummel, the Green Tree Home and the Riverbend condominium, furniture, fixtures and appliances located at the Green Tree Lane Home.

9. The Mastercharge account of plaintiff, upon separation of the parties on or about January 1, 1981, is the separate debt of the plaintiff.

10. Any other debt incurred by her for her personal benefit or for assets in her possession from January 1, 1981, are the separate debts of plaintiff and plaintiff is ordered to hold harmless the defendant from any liability thereon.

11. Any debts incurred by defendant for his personal benefit or for assets in his possession from January 1, 1981, are the separate debts of the defendant and the defendant is ordered to hold harmless the plaintiff for any liability thereon.

12. The debt for preparation of plaintiff's 1980 income tax return by Pannell, Kerr, Forster in the sum of $4,150 and any 1980 income taxes assessed in plaintiff's return for non-oil business income are the separate debts of the plaintiff and the plaintiff is ordered to hold harmless defendant from any liability thereon.

13. Defendant is awarded as his separate property the leases pledged to secure a loan from First National Bank of Dallas as follows: Federal Lease 39170, 320 acres; Wyoming No. 6718806, 640 acres; Wyoming 72-6768, 40 acres; Federal 9392, 240 acres; Federal 9393, 80 acres; and Moore Mineral Trust, 600 acres.

Also awarded to defendant as his separate property are Leases No. W-62606, Weston, Wyoming, 960 acres; No. W-64007, Weston Wyoming, 600 acres; No. W-62032, Natrona, Wyoming, 318.88 acres; No. M-26718, Treasure Montana, 2,245.18 acres; No. M-25686, Toole, Montana, 480 acres.

14. Plaintiff is awarded as her separate property the five (5) leases listed in her name as follows: Lease No. W-30914, Park Wyoming, 960 acres; No. W-62076, Park, Wyoming, 320 acres; No. 77-0644, Natrona, Wyoming, 80 acres; 78-0827, Park Wyoming, 200.10 acres; ES-10344, Smith, Mississippi, 40.50 acres, and leases No. W-63043, Campbell, Wyoming, 80 acres; No. ES-15222, Newaygo, Michigan, 646.45 acres; No. ES-15557, Newaygo, Michigan, 1,616.20 acres; No. ES-13596, Wayne, Mississippi, 1,141.60 acres; No. U-39214, Emery and Grand, Utah, 511.48 acres; No. U-43378, Uintah, Utah, 40 acres; No. C-25929, San Miguel, Colorado, 601.47 acres, and No. M-34936, Phillips, Montana, 309.05 acres.

15. The defendant is ordered to pay the loan from First National Bank of Dallas and to hold plaintiff harmless from any liability thereon.

16. The Hummel Wells Joint Venture assets are awarded to defendant as his separate property.

17. The stocks held at Paine Webber Company in the name of Peter W. Hummel are awarded to defendant as his separate property.

18. The one percent (1%) general partnership interest in Tide Petroleum is awarded to defendant as his separate property.

19. The 1978 Cadillac Eldorado is awarded to the Defendant as his separate property.

20. The limited partnership interests and the general partnership interests of Peter W. Hummel in Intermountain Petroleum Company are awarded to defendant as his separate property.

21. The limited partnership interests of Sally C. Hummel in Intermountain Petroleum Company is awarded to plaintiff as her separate property.

22. The limited partnership interests of plaintiff described in the Findings hereinabove in Western Petroleum Company, L.P., Pecos River Petroleum Company, L.P., Tidelands Energy Company, L.P., Delta Exploration Company, L.P., and Energy Production Company, L.P., are awarded to plaintiff as her separate property subject to the provision of paragraph 24 of this Judgment.

23. Each of the parties is awarded a twenty percent (20%) interest in the Alaska Offshore Petroleum Company and the Dixie Gulf Petroleum Company.

24. The general partnership interests and the limited partnership interests of defendant in Western Petroleum Company, L.P., Pecos River Petroleum Company, L.P., Tidelands Energy Company, L.P., Delta Exploration Company, L.P., and Energy Production Company, L.P., are awarded to defendant as his separate property; provided, however that the partnership disbursements of Western Petroleum Company, L.P., Pecos River Petroleum Company, L.P., Tidelands Energy Company, L.P., Delta Exploration Company, L.P., and Energy Production Company, L.P., to the parties shall be allocated one-half (½) to plaintiff and one-half (½) to defendant.

25. One half (½) of any royalty income on the "Peter Hummel Leases, Assigned" (Exhibit 2, in evidence in the trial of this action) is awarded to each of the parties as separate property and defendant is ordered to assign an undivided one-half (½) interest in the overriding royalties of each of said leases to plaintiff as her separate property.

26. Each of the parties is directed to execute such assignments, releases, quit claim deeds and checks as may be necessary to carry out the judgment of this Court and make a mutual, physical exchange of all of the same at a date and time and place agreed upon by the parties or as directed by the Court.

27. Each party shall pay his or her own attorneys' fees, court costs, trial preparation and accounting fees.

DATED: This 30th day of December, 1983.

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DISTRICT JUDGE

APPENDIX B

No. 16150

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

SALLY HUMMEL,
Petitioner,

vs.

PETER HUMMEL,
Respondent.

ORDER DISMISSING APPEAL

This is an appeal from a judgment of the district court granting a divorce to the parties and dividing their community property. The parties to this appeal were married in 1952. During the course of their marriage they had five children, one of whom is still a minor. They also accumulated substantial income, a major source of which was derived from interest on two trust fund accounts which appellant's father had established for her as a lifetime beneficiary. It is undisputed that at the time those interest payments were made they were the separate property of the appellant; however, the primary issue in this appeal is whether the trial court erred by finding that the appellant donated the trust income to the community.

The appellant first contends that she never intended a gift of her trust income to the community and that the trial court erred in finding otherwise. Our review of the record reveals conflicting evidence on this point. Initially, appellant asserts that the trust income was used to pay

community obligations only because there was no other source of income with which to meet those obligations. She also asserts that the respondent assumed control of the parties' finances and deprived her of any management opportunities. Finally, as evidence of her contention that the parties had agreed that she would be reimbursed for all expenditures of her separate funds, appellant introduced a $20,000.00 demand note given to her by respondent during the course of the marriage. That note does not recite any underlying obligation.

Respondent's description of the marital finances differs greatly from appellant's. He asserts that both parties willingly contributed their separate incomes to the community. He acknowledges that the family oil business was substantially funded by appellant's trust income; however, he asserts that the primary reason the business was founded was to shelter that income from the applicable seventy-percent tax rate. Respondent also asserts that throughout the course of the marriage both parties routinely considered all of their income to be community property. He points out that all funds were deposited in joint tenancy bank accounts. He also explained that the demand note was given to appellant in an effort to avoid future gift taxes, not as consideration for the use of her separate income.

Whether the appellant intended a gift to the community of her separate income is a question of fact for the trial court. As the trier of fact, it was the trial court's duty to assess the credibility of the witnesses and to determine the weight of their testimony. Carlson v. McCall, 70 Nev. 437, 271 P.2d 1002 (1954). The trial court in the instant case listened to the testimony of the parties and concluded that "[t]he history of the marriage . . . does not support [the] present position . . . taken [by appellant]

since substantial animosity has arisen between the parties." Where a trial court, sitting without a jury, has made a determination upon the basis of conflicting evidence, that determination will not be disturbed on appeal if it is supported by substantial evidence. Fletcher v. Fletcher, 89 Nev. 540, 516 P.2d 103 (1973). Because substantial evidence exists in the record to support the district court's determination, we decline to disturb it on appeal. *Id.*; see also Zahringer v. Zahringer, 76 Nev. 21, 348 P.2d 161 (1960).

Appellant also contends that the trial court erred in its division of community assets, particularly a number of mineral leases and partnership interests. Appellant argues in this regard that the trial court failed to divide the community property "equally." We have consistently held that, when dividing community property, a trial court is not required to made an equal distribution, merely an equitable one. Johnson v. Steel, Inc. 94 Nev. 483, 581 P.2d 860 (1978); Fox v. Fox, 81 Nev. 186, 401 P.2d 53 (1965).

Our review of the record reveals that the trial court distributed the community property after a thorough and careful consideration of the testimony and documentary evidence presented by both parties. The difficulty of the district court's task was compounded by the parties' inability to present evidence of the value of much of the community property. Further, the failure to prove the value of those assets renders it manifestly impossible for this court to determine that the trial court's division of the community assets was inequitable. We must therefore reject this contention.

We have reviewed appellant's remaining assignments of error and conclude they are without merit. Accordingly, we ORDER this appeal dismissed.

______________________________, C.J.
Mowbray

______________________________, J.
Gunderson

______________________________, J.
Steffen

______________________________, J.
Young

______________________________, D.J.[1]
Sullivan

cc: Hon. Roy L. Torvinen, District Judge
Conner and Steinheimer
Marvin Mitchelson
Eugene J. Wait, Jr.
Lionel, Sawyer and Collins
M. Kristina Pickering
Judi Bailey, Clerk

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[1]The Honorable Richard Bryan, Governor, designated the Honorable Jerry V. Sullivan, District Judge of the Sixth Judicial District, to sit in this case in place of the Honorable Charles E. Springer, Justice, who voluntarily disqualified himself. Nev. Const., art. 6, § 4.

APPENDIX C

No. 16150

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

SALLY HUMMEL,
Appellant,
vs.
PETER HUMMEL,
Respondent.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

______________________, C. J.
Mowbray

______________________, J.
Gunderson

______________________, J.
Steffen

______________________, J.
Young

______________________, D. J.[1]
Sullivan

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[1]The Honorable Jerry V. Sullivan, District Judge of the Sixth Judicial District, was designated by the Governor to participate in the decision of this case in the place of the Honorable Charles E. Springer, Justice, who voluntarily disqualified himself. Nev. Const. art. 6 § 4.

cc: Hon. Roy L. Torvinen, District Judge
Conner & Steinheimer
Marvin Mitchelson
Eugene J. Wait, Jr.
Lionel Sawyer & Collins
Judi Bailey, Clerk

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 10, 1986, I served the within Petition for Writ of Certiorari in re: "Sally Hummel vs. Peter Hummel" in the United States Supreme Court October Term 1986 No.

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

M. Kristina Pickering
Laura B. Ahearn
Lionel, Sawyer & Collins
1100 West Liberty, Suite 1100
Reno, Nevada 89501

Eugene J. Waitjer
305 West Moana
Reno, Nevada 89509

Attorneys for Respondent Peter Hummel

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 10, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA